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Supreme Court of the United States

OCTOBER TERM, 1938

No. 481

ROCHESTER TELEPHONE CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Appellees.

APPELLANT'S SUPPLEMENTAL BRIEF ON ISSUE OF JURISDICTION

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PRELIMINARY STATEMENT

This case comes to this Court under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220, Chap. 32, 28 U. S. C. Sec.'s 47, 47a).

The jurisdiction of the Court below was not questioned by the appellees. It was they who prepared and submitted the conclusion made by the District Court that: "This court has jurisdiction of the action and of all parties hereto." (R. 447). None of the parties has assigned this conclusion as error on this appeal (R. 452–454). It follows, therefore, that the District Court dismissed appel-

lant's bill on the merits—not for lack of jurisdiction (R. 447, 450).

Appellant has prepared this brief for submission against the possibility that the issue of jurisdiction (as it is affected by the *nature or character* of the Orders sought to be reviewed) may be raised on this appeal either for the first time by the appellees or by this Court. Jurisdiction in general has already been covered by appellant in its separately printed "Statement as to Jurisdiction" and in its main Brief (pp. 1, 2).

ARGUMENT

I

THE FINAL ORDER OF THE COMMISSION AND ITS GENERAL ORDERS WITH WHICH APPELLANT WAS DIRECTED TO COMPLY PURSUANT TO SAID FINAL ORDER ARE REVIEWABLE UNDER THE URGENT DEFICIENCIES ACT AND THE DISTRICT COURT, THEREFORE, HAD JURISDICTION OF THIS SUIT.

Prior to making its final Order of November 18, 1936 (R. 430) the Commission directed that appellant comply with certain general Orders (R. 21–30). These general Orders require appellant to file a number of reports with, and submit voluminous data to, the Commission (R. 21-30). Appellant refused to obey these general Orders. An *actual controversy* ensued between appellant and the Commission over their validity (Petition, R. 2, 3). But appellant did not at once seek relief in the courts. It preferred first to exhaust its remedies before the Commission (Peti-

tion. Par. Seventh, R. 2). This alternative has long had the approval of this Court.

It was in consequence of the above controversy that hearings were held by the Commission resulting in its Report (R. 411) and final Order. This final Order reads as follows:

> "Pursuant to the Report of the Commission issued by the Telephone Division herein, it is hereby ordered that the Rochester Telephone Corporation, as a wire telephone carrier, be, and the same is hereby, classified as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division applicable to wire telephone carriers whose annual gross operating income exceeds $50,000" (R. 430).

For convenience, appellant's main Brief usually refers only to the final Order of the Commission, since by its terms it is made applicable to and incorporates by reference the previous general Orders (appellant's main Brief, p. 3). *All of these Orders, however, were attacked in the District Court and are attacked on this appeal.* This suit was brought to enjoin *both* said final Order and said general Orders (Petition, R. 2–5). In its Brief in the District Court appellant asked that "the Orders described in the Petition" be enjoined, set aside and annulled. The conclusions of the District Court in respect to *all* of said Orders are assigned as error on this appeal (appellant's main Brief, p. 15; R. 453, 454, 456). Further, appellant's "Statement as to Jurisdiction" shows clearly (pp. 2, 3) that this suit attacks both said general Orders and said final Order.

The forepart of the final Order of the Commission quoted above merely determines the status of appellant under the Communications Act of 1934 (Act of June 19, 1934, Chap. 652, 48 Stat. at L. 1064, Chap. 652, 47 U. S. C., Sec. 151). This determination standing by itself might not be reviewable, *Lehigh Valley R. R. Co. v. U. S.*, 243 U. S. 412, 414, *Shannahan v. U. S.*, 303 U. S. 596, 599, but the latter portion of said final Order directs that appellant be subject to all orders of the Telephone Division of the Commission applicable to wire telephone carriers whose annual gross operating income exceeds $50,000. Such general Orders (of the Telephone Division) *had already been made and served upon appellant* (R. 21–30). Thus when the latter portion of said final Order is read together with said prior general Orders (as they must and were obviously intended by the Commission to be), it is patent that appellant was at once under a series of affirmative, final and imminent mandates.

Perhaps if the general Orders had not previously been made, the latter portion of the final Order might be said to constitute a mere notification and, hence, not subject to review. But it must be kept in mind that the final Order resulted from and relates back to an actual controversy over the general Orders (R. 2, 3). If this were not so, the latter portion of the final Order would obviously be surplusage. Separation of the final Order from the general Orders ignores the realities of the situation and sacrifices substance to form. This Court has said that ". . . overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect."

Powell v. U. S., 300 U. S. 276, 285.

The purpose of the final Order of the Commission was to compel appellant forthwith to comply with the previous general Orders to which said final Order referred. The general Orders are not only orders in form but are definitely affirmative in form and substance. Authoritatively and unequivocally they command appellant to do something, to wit, to file reports and submit extensive data to the Commission (R. 21–30).

> *American Telephone & Telegraph Co., et al. v. U. S.*, 299 U. S. 232, affirming 14 Fed. Supp. 121.

The effect of the Orders was to deprive appellant of the privilege or license granted it by Section 2 (b) (2) of the Communications Act, *supra*. The Orders had the immediate effect of changing appellant's status. No longer was it to be subject to regulation solely by the New York State Public Service Commission—it was now also to be under the regulatory power of a federal Commission. In addition, the failure to comply with said Orders by appellant rendered it at once subject to civil suit under Section 401 of the Communications Act, *supra*, and criminal penalties under Sections 501 and 502 thereof. Unlike the situation in *Lehigh Valley R. R. Co. v. U. S.*, *supra*, the risk to which appellant was now immediately subjected proceeded from the Orders and not from the Act.

We do not have here, as in *Lehigh Valley R. R. Co. v. U. S.*, *supra*, an order negative in substance as well as in form, nor do we have a negative order which cannot be violated or call for enforcement as in *Piedmont & Northern Ry. Co. v. U. S.*, 280 U. S. 469. The instant Orders

were forthwith enforceable by the Commission in ... courts (Section 401 of the Communications Act, *supra*).

As in *U. S. v. New River Co.*, 265 U. S. 533, the ... presented more than merely a case where affirmative ... sought by the carrier is denied by the Commission. ... is not "merely preparation for possible action in some ... ceeding which may be instituted in the future," *Shaw ... v. U. S.*, *supra*, (p. 599), but definite, present action ... nant with finality.

If the Orders in question are not reviewable under ... provisions of Section 402 (a) of the Communications A... *supra*, it is earnestly submitted that such provisions ... meaningless and in effect grant no review at all.

II

SINCE THIS COURT HAS JURISDICTION TO REVI... THE ORDERS OF THE COMMISSION, THE CASE SHOU... BE HEARD ON THE MERITS AND THE DECREE BE... REVERSED.

Respectfully submitted,
T. Carl Nixon,
Counsel for Appellant.

Justin J. Doyle,
Of Counsel.